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Yong Teck Lee & Anor v Amarjit Singh

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HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24–99/10 OF 2019
WONG SIONG TUNG JC
11 MAY 2020

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Civil Procedure — Costs — Order for costs — Plaintiff withdrew action — Whether parties should be made to bear own costs — Whether plaintiff was defeated or acknowledged defeat — Whether plaintiff acted reasonably in commencing action — Whether subject of dispute was removed or changed — Whether there was unreasonable delay to convey the intention to withdraw — Whether action was commenced for public interest

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This was an application by the plaintiffs seeking injunctions to restrain the defendant from exercising the powers of the Director of Sabah State Water Department and to restrain the defendant from entering in the premises, offices and/or branches of the Sabah State Water Department on the basis that the defendant's appointment contravened s 3 of the Sabah Water Supply Enactment 2003 as earlier declared by the court. In the affidavit in opposition affirmed by the defendant on 21 November 2019, it was revealed that after the court's declaration, the defendant was appointed as technical adviser and based in the State Secretary's Office, Chief Minister Department and that, on 14 October 2019, the defendant was transferred from the State Secretary's Office to the Sabah State Water Department to carry on the duties as the director by way of contract, and that the defendant was infact acting under a new appointment. Thereafter the plaintiff had filed and served an affidavit in reply and the defendant also filed and served his affidavit in further reply. When the action was called for hearing, the plaintiffs applied to withdraw the action as the matter has become academic in view of the new appointment of the defendant. The defendant had no objection to the withdrawal but applied for an order that the plaintiffs pay the defendant costs of this action. The plaintiffs on the other hand contended that each party shall bear their own costs in the circumstances and that this action was a public interest litigation. Issue for consideration by the court whether taking into consideration the whole circumstances and situation, the discontinuance or withdrawal of the action by the plaintiff could safely be equated with defeat or an acknowledgment of likely defeat so as to justify that the plaintiffs be ordered to pay the defendant costs of the action.

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Held, granting plaintiff leave to withdraw or discontinue the action and respective parties shall bear their own costs:

(1) When there was no hearing of merits because a plaintiff withdraws or discontinues the action, ordinarily a defendant is entitled to be paid costs by the plaintiff because such withdrawal or discontinuance of the action was generally treated as a defeat or acknowledgement of defeat or likely a defeat of the plaintiff's action. It was for the court to determine whether taking into consideration the whole circumstances and situation, the discontinuance or withdrawal of the action by the plaintiff can safely be equated with defeat or acknowledgement of defeat so as to justify that the plaintiffs be ordered to pay defendant costs of the action. The court was entitled to take into consideration whether the plaintiffs had acted reasonably in commencing the action and whether the action was ex facie certain to fail when it can be discerned without delving into the merits (see paras 20 & 27–28).

(2) The court had declared the appointment of the defendant to be clearly in contravention of s 3 of the Sabah Water Supply Enactment, but the defendant continued to act as the Director of Sabah State Water Department. It was a difficult proposition to swallow that an act declared to be contravening the law was still legal and lawful and meant nothing. It was reasonable for any law-abiding citizen to feel disturbed. In the circumstances, it was not unreasonable for the plaintiffs as the procurer of the court's declaration in the previous action to commence the action herein on 21 October 2019 (see paras 30–32).

(3) It was after the plaintiffs commenced the action on 21 October 2019 that the Sabah State Public Service Commission issued a letter dated 30 October 2019 to the defendant and appointed him as a technical adviser based in the State Secretary's Office with retrospective effect to 11 October 2019. The defendant was immediately transferred to Sabah State Water Department to carry on duties as the director. It was difficult not to believe that such moves were not in response to counter the plaintiffs' action herein as commenced. The result was that thenceforth, the defendant was acting under a new appointment (see paras 34–37).

(4) The new appointment of the defendant removed or changed the subject of the disputes in the action which was based on the previous appointment of the defendant declared earlier by the court to be in contravention of s 3 of the Sabah Water Supply Enactment. Any issues of the impropriety of the defendant continuing to act and exercise the power as the director under the previous appointment became non-issues. The basis of the plaintiffs' actions to restrain the defendant from continuing to act and exercise power as the director under the previous appointment and any cause of action in remedial thereto had been removed by the new appointment (see paras 38 & 40).

(5) There was no undue or unreasonable delay on the part of the plaintiffs to convey to the defendant's solicitors the plaintiffs' decision to withdraw or

discontinue the action herein, which was before the said scheduled hearing date. Obviously, the defendant had no wish also for the action to proceed to full hearing or trial and thus, required the plaintiffs to withdraw and discontinue the action. Further, the defendant failed to persuade this court that the plaintiffs' action was so plainly and obviously unsustainable and was certain to fail (see paras 44–45 & 49).

(6) Having regards to the whole circumstances and situation, particularly the change of event by the new appointment of the defendant brought after the plaintiffs commenced the action herein renders the action academic, the decision by the plaintiffs to withdraw or discontinue the action cannot safely be equated with defeat or acknowledgement of likely defeat of the action. Further, the plaintiff appeared to have commenced the action herein for public interest that the law is adhered to. It was unfair and unjust to penalise the plaintiffs to pay costs of the action (see paras 54–56).

[Bahasa Malaysia summary

Ini merupakan permohonan dari plaintif untuk injunksi bagi menghalang defendant dari menjalankan kuasa pengarah Jabatan Air Sabah dan bagi menghalang defendan dari memasuki premis, pejabat dan/atau cawangan Jabatan Air Sabah atas alasan bahawa pelantikan defendan melanggar s 3 Enakmen Bekalan Air Sabah 2003 sepertimana yang telah diputuskan oleh mahkamah terdahulu. Dalam afidavit bantahan yang difailkan oleh defendan pada 21 November 2019, menjelaskan bahawa selepas perisytiharan dari mahkamah, defendan telah dilantik sebagai penasihat teknikal dan berpengkalan di Pejabat Setiausaha Negeri, Jabatan Ketua Menteri dan pada 14 Oktober 2019, defendan telah dipindahkan dari Pejabat Setiausaha Negeri ke Jabatan Bekalan Air Sabah untuk menjalankan tugas pengarah melalui kontrak, dan defendan sebenarnya bertugas dibawah pelantikan baru. Selepas dari itu, plaintif telah memfailkan dan menyerahkan afidavit jawapan dan defendan juga telah memfailkan dan menyerahkan afidavit jawapan lanjut. Apabila tindakan tersebut dipanggil untuk pendengaran, plaintif telah memohon untuk menarik balik tindakan atas alasan memandangkan perkara kini telah menjadi akademik mengambil kira pelantikan baru defendan. Defendan tidak membantah permohonan untuk menarik balik tersebut tetapi memohon untuk satu perintah agar plaintif membayar kos untuk tindakan ini. Plaintif pula menghujahkan bahawa pihak-pihak menanggung kos mereka sendiri dalam keadaan bahawa tindakan ini merupakan satu tindakan kepentingan awam. Isu untuk dipertimbangkan oleh mahkamah adalah sama ada apabila mengambil kira keseluruhan keadaan, penarikbalikan tindakan oleh plaintif boleh disamakan dengan ketewasan atau pengiktirafan kebarangkalian tinggi untuk tewas untuk memberi justifikasi bahawa plaintif diperintahkan untuk membayar kos kepada defendan untuk tindakan.

Diputuskan, membenarkan izin kepada plaintif untuk menarik balik atau tidak meneruskan tindakan dan setiap pihak untuk menanggung kos sendiri:

(1) Tiada pendengaran berkaitan dengan merit kes kerana plaintif menarik balik atau tidak meneruskan tindakan, kebiasaannya defendan berhak untuk dibayar kos oleh plaintif kerana penarikbalikan tersebut secara amnya dianggap sebagai ketewasan tindakan plaintif atau pengiktirafan kebarangkalian tinggi untuk tewas. Adalah untuk mahkamah untuk menentukan sama ada, setelah mengambil kira keseluruhan keadaan, penarikbalikan boleh disamakan dengan ketewasan atau pengiktirafan tewas untuk memberi justifikasi agar plaintif diperintahkan untuk membayar defendan kos untuk tindakan. Mahkamah berhak untuk mengambil kira sama ada plaintif telah bertindak secara munasabah dalam memulakan tindakan dan sama ada tindakan tersebut ex facie akan gagal dan sama ada ianya boleh dilihat tanpa mengkaji merit (lihat perenggan 20 & 27–28).

(2) Mahkamah telah mengisytiharkan pelantikan defendan bercanggah dengan s 3 Enakmen Bekalan Air Sabah, akan tetapi defendan terus bertindak sebagai pengarah Jabatan Bekalan Air Sabah. Adalah amat sukar untuk menerima bahawa satu tindakan yang telah diisytiharkan bercanggah dengan undang-undang masih sah dan tidak mempunyai apa-apa kesan. Adalah munasabah untuk mana-mana ahli masyarakat yang mematuhi undang-undang untuk berasa terganggu. Dalam keadaan ini, ianya adalah munasabah bagi plaintif sebagai penerima perisytiharan mahkamah dalam tindakan terdahulu untuk memulakan tindakan di sini pada 21 Oktober 2019 (lihat perenggan 30–32).

(3) Hanya selepas plaintif memulakan tindakan pada 21 Oktober 2019 bahawa Suruhanjaya Perkhidmatan Awam Sabah mengeluarkan satu surat bertarikh 30 Oktober 2019 kepada defendan dan melantiknya sebagai penasihat teknikal yang berpengkalan di Pejabat Setiausaha Negeri yang berkuatkuasa kebelakang pada 11 Oktober 2019. Defendan telah dengan serta merta dipindahkan kepada Jabatan Bekalan Air Negeri Sabah untuk menjalankan tugas sebagai pengarah. Adalah tidak sukar untuk mempercayai bahawa tindakan sedemikian adalah bertujuan untuk membalas tindakan plaintif yang dimulakan di sini. Hasilnya adalah bahawa selepas itu, defendan kini bertindak dibawah pelantikan baru (lihat perenggan 34–37).

(4) Pelantikan baru defendan mengeluarkan atau menukarkan perkara pertelingkahan dalam tindakan yang berdasarkan pelantikan terdahulu defendan yang diisytiharkan bercanggah dengan s 3 Sabah Water Supply Enactment. Apa-apa isu ketidakpatuhan defendan yang terus bertindak dan menjalankan kuasa sebagai pengarah dibawah pelantikan terdahulu kini tidak lagi menjadi isu. Asas tindakan plaintif untuk menghalang defendan daripada terus bertindak dan menjalankan kuasa sebagai

pengarah dibawah pelantikan terdahulu dan apa-apa kausa tindakan untuk memulihkannya telah dikeluarkan dengan pelantikan baru (lihat perenggan 38 & 40).

(5) Tiada penangguhan yang tidak munasabah di pihak plaintif untuk memaklumkan kepada peguam defendan keputusan plaintif untuk menarik balik atau tidak meneruskan tindakan di sini, yang mana adalah sebelum tarikh pendengaran yang dijadualkan. Adalah jelas bahawa defendan juga tidak berniat untuk meneruskan dengan perbicaraan penuh dan oleh itu, memerlukan plaintif untuk menarik balik dan tidak meneruskan tindakan. Lanjutan itu, defendan gagal untuk meyakinkan mahkamah ini bahawa tindakan plaintif adalah jelas tidak boleh diteruskan dan akan gagal (lihat perenggan 44–45 & 49).

(6) Berkaitan dengan keseluruhan keadaan, terutamanya pertukaran keadaan dengan pelantikan baru defendan yang dibuat selepas plaintif memulakan tindakan di sini, menyebabkan tindakan ini menjadi akademik, keputusan plaintif untuk menarik balik atau tidak meneruskan tindakan ini tidak boleh dikatakan sebagai tindakan tersebut telah tewas. Lanjutan itu, plaintif kelihatan telah memulakan tindakan di sini untuk kepentingan awam bahawa undang-undang adalah dipatuhi. Adalah tidak adil dan tidak wajar untuk menghukum plaintif untuk membayar kos tindakan (lihat perenggan 54–56).]

Cases referred to

Australian Securities Commission v Aust-Home Investments Ltd and others (1993) 116 ALR 523, FC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Barretts & Baird (Wholesale) Ltd and others v Institution of Professional Civil Servants and others [1987] IRLR 3, QBD (refd)

Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd & Ors [1992] 1 MLJ 779, HC (refd)

JT Stratford & Son Ltd v Lindley and Others (No 2) [1969] 3 All ER 1122, CA (refd)

Lin Securities (Pte) (in liquidation) v Official Assignee (Malaysia) of the estate of Tan Koon Swan, a bankrupt and another [1992] 2 SLR 1017; [1992] 2 SLR R 519, HC (refd)

Minister for Immigration and Ethnic Affairs and another, Re; Ex parte Lai Qin (1997) 143 ALR 1, HC (refd)

One.Tel Ltd v Deputy Commissioner of Taxation (2000) 171 ALR 227, FC (refd)

Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v Ann Joo Steel Sdn Bhd and another appeal [2017] 6 MLJ 397, CA (refd)

Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325; [2005] 2 CLJ 122, CA (refd)

Tan Kim Hai and Sons Enterprises Sdn Bhd & Ors v Tam Kim San and Sons Sdn

Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners) [1996] 5 MLJ 593, HC (refd)
Walker Wingsail Systems Ltd, In Re; Walker v Walker [2005] EWCA Civ 247, CA (refd)

Legislation referred to

Government Proceedings Act 1956 s 29(2)
Rules of Court 2012 O 59 r 3(2)
Water Supply Enactment 2003 ss 3, 66

Yong Yit Yee (Darren Punai with her) (Yong & Punai Chambers) for the plaintiffs.
Christopher Chong (Lind Willie Wong & Chin) for the defendant.

Wong Siong Tung JC:

BRIEF BACKGROUND

[1] The defendant was appointed by the Public Service Commission as the director of Sabah Water Department on 10 August 2018 upon a three-year contract.

[2] On 9 October 2019, in an action commenced by the plaintiffs against the defendant and the State Government of Sabah in the High Court in Originating Summons No BKI-24–27/3 of 2019, the court granted the plaintiffs a declaration that the defendant's said appointment by the State Government of Sabah contravened s 3 of the Sabah Water Supply Enactment 2003. This is because the defendant was not from amongst the members of the State Public Service at the time of his appointment.

[3] On 21 October 2019, the plaintiffs commenced the action herein against the defendant seeking injunctions to restrain the defendant from exercising the powers of the director of Sabah State Water Department and also to restrain the defendant from entering into the premises, offices and/or branches of Sabah State Water Department in the capacity of the director of Sabah State Water Department mainly on the basis that the defendant's said appointment contravened s 3 of the Sabah Water Supply Enactment 2003 as declared by the court earlier.

[4] In the affidavit in opposition affirmed by the defendant on 21 November 2019 (encl 12) filed herein, it was revealed then that following the said court's declaration on 9 October 2019, and on 11 October 2019, the defendant was appointed as a technical adviser based in the State Secretary's Office, Chief Minister Department. It was also revealed that on 14 October

2019, the defendant was transferred from the State Secretary's Office to the Sabah State Water Department to carry on duties as the director by way of contract.

[5] Thereafter, the plaintiff filed and served an affidavit in reply (encl 13) and the defendant also filed and served his affidavit in further reply (encl 16).

[6] When the plaintiffs action was called for hearing on 21 January 2020, the plaintiff applied to withdraw the action as the matter has become academic in view of the new appointment of the defendant.

[7] The defendant has no objection to the withdrawal but applied for an order that the plaintiffs pay the defendant costs of this action.

[8] The plaintiffs on the other hand, contended that each party shall bear their own costs in the circumstances and that this action is public interest litigation.

[9] Parties are then directed to make submissions on the issues relating to costs of the action and also to consider the applicability of the principles of law as propounded in *Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd & Ors* [1992] 1 MLJ 779; *Tan Kim Hai and Sons Enterprises Sdn Bhd & Ors v Tam Kim San and Sons Sdn Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners)* [1996] 5 MLJ 593 and *JT Stratford & Son Ltd v Lindley and Others (No 2)* [1969] 3 All ER 1122 which they did.

PRINCIPLES OF LAW IN THE EXERCISE OF DISCRETIONARY POWER TO ORDER COSTS

[10] The power to order payment by one party to another party of any costs of or incidental to any proceedings is in the discretion of the court. Under O 59 r 3(2) of the Rules of Court 2012, as a general rule, costs ordered to be paid should follow event.

[11] That means the successful party is prima facie entitled to his or her costs except when the circumstances are such as to warrant a departure from the general rule. *Malaysian Civil Procedure 2018*, Vol 1, paras 59/3/2 to 59/3/2, p 796.

[12] Thus, by the general rule, success in the action or in a particular issue in a proceeding is the main factor ordinarily that detects the exercise of the court discretion. Success in the action depends on the merits of the case of the parties.

[13] However, when merits of the case were not adjudicated by the court for some reasons such as a plaintiff has decided to withdraw or discontinue his/her claim in the action before trial or full hearing, there is an absence of this success factor for the application of the general rule.

[14] In *JT Stratford & Son Ltd v Lindley and Others (No 2)* [1969] 3 All ER 1122, after successfully obtained an interim injunction, the plaintiffs did not proceed with the action. The defendants took out an application to dismiss the action for want of prosecution and asked for all costs to be paid by the plaintiffs whereas, the plaintiffs applied for leave to discontinue the action with an order requiring the defendants to pay costs.

[15] The English Court of Appeal refused to go into the question whether if the action had been tried on its merits, the plaintiff would probably win the action so as to award costs to the plaintiff as urged by counsel for the plaintiffs. In that case, both the plaintiff and the defendant simply did not wish to proceed with the action. In the circumstances, the court gave leave to the plaintiffs to discontinue the action and order each party to bear their own costs.

[16] In *Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd & Ors* [1992] 1 MLJ 779, the plaintiff commenced action to recover various sums from the first defendant as the principal debtor and six other defendants as the guarantor in respect of banking facilities. The fifth defendant filed his defence. Judgment in default was entered against the first and seventh defendants for the sums claimed. The judgment debt was fully settled by the other defendants against whom the action was discontinued except the fifth defendant. The fifth defendant also filed an application to dismiss the plaintiff's action for want of prosecution and costs and whereas the plaintiff also applied for leave to discontinue the action against the fifth defendant and for costs of the application.

[17] The fifth defendant in that case also contended on the strength of his defence in attempting show that the plaintiff's case lacked merit.

[18] The court held that it would be a waste of time to try the applications on its merits merely for the sake of the question of costs and thus refused to go into the merits. Following *JT Stratford & Son Ltd v Lindley and Others (No 2)* [1969] 3 All ER 1122, the court granted plaintiff leave to discontinue the action against the fifth defendant with each party to pay its own costs. In that case, the action was not proceeded to trial because the action has become academic due to the settlement of the judgment debt by the other defendants.

[19] Thus, the court will not delve into the merits of the case of the parties to hypothetically determine the outcome of the action for deciding who should bear the costs.

[20] When there is no hearing on the merits because a plaintiff withdraws or discontinues the action, ordinarily a defendant is entitled to be paid costs by the plaintiff because such withdrawal or discontinuance of the action is generally treated as a defeat, or acknowledgement of defeat or a likely defeat of the plaintiff's action. See *Lin Securities (Pte) (in liquidation) v Official Assignee (Malaysia) of the estate of Tan Koon Swan, a bankrupt and another* [1992] 2 SLR 1017; [1992] 2 SLR R 519 and *In Re Walker Wingsail Systems Ltd; Walker v Walker* [2005] EWCA Civ 247.

[21] The court has to look at the whole situation to see whether such discontinuance or withdrawal of the action can safely be equated with defeat or an acknowledgement of likely defeat. See *Barretts & Baird (Wholesale) Ltd and others v Institution of Professional Civil Servants and others* [1987] IRLR 3.

[22] In *Tan Kim Hai and Sons Enterprises Sdn Bhd & Ors v Tam Kim San and Sons Sdn Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners)* [1996] 5 MLJ 593, the plaintiffs commenced action against defendants for breach of agreement relating to sale of shares in a Malaysian company and also in a Singapore company. After obtaining interim injunction against the defendants restraining dealings in the lands and shares in Malaysian company, the plaintiffs reached a settlement with the defendants in a court proceeding in Singapore whereby consent judgment was recorded by which the plaintiffs achieved the reliefs that the plaintiffs had sought for in the action. The plaintiff therefore sought to discontinue the action. The issue is whether the plaintiffs should be ordered to pay costs of the action.

[23] Following *Barretts & Baird (Wholesale) Ltd and others v Institution of Professional Civil Servants and others* [1987] IRLR 3, the court held that mere discontinuance or withdrawal of action by reason of the action becoming academic cannot be equated with defeat or an acknowledgement of likely defeat. In that case, the action was not proceeded to trial because the action became unnecessary because of the settlement that the plaintiffs reached with the defendants in Singapore for which the plaintiffs achieved all the reliefs sought for in the action.

[24] In *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 171 ALR 227, Burchett J of the Federal Court of Australia, New South Wales said at para 6 that:

> [6] In my opinion, *it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where*

A *some supervening event or settlement so removes or modifies the subject of the dispute* that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the court's discretion otherwise than by an award of costs to the successful party.*It is the latter type of case which more*
B *often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs.* (Emphasis added.)

[25] In *Re Minister for Immigration and Ethnic Affairs and another; Ex parte Lai Qin* (1997) 143 ALR 1, Justice Hugh J stated at pp 3–4 that:

C In an appropriate case, a court will make an order for cost even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do would burden the parties with the costs of a litigation action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able
D to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence a litigation. Thus, for example, in *R v Gold Coast City Council; Ex parte*
E *Raysun Pty Ltd*, the Full court of the Supreme Court of Queensland gave a prosecutor seeking mandamus the costs of proceedings up to the date when the respondent council notified the prosecutor that it would give the prosecutor relief that it sought. The Full court said that the prosecutor had reasonable ground for complaint in respect of the attitude taken by the respondent in failing to consider
F the application by the prosecutor for approval of road and drainage plan.

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *South East Queensland Electricity Board v Australian Telecommunications*
G *Commission* where his Honour ordered the respondent to pay 80% of the applicant's taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the
H litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

[26] In *Australian Securities Commission v Aust-Home Investments Ltd and*
I *others* (1993) 116 ALR 523, after reviewing several decided cases including *JT Stratford & Son Ltd v Lindley and Others (No 2)* [1969] 3 All ER 1122, Hill J of the Federal Court of Australia, Queensland stated at p 530 that:

These cases seem to me to support the following propositions being made:

(1) Where neither party desires to proceed with litigation the court should be ready to facilitate the conclusion of the proceedings by making a cost order: *Stratford* and the *SEQEB* case.

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a court determining how the costs of the proceeding should be borne to endeavour to determine for itself the case on the merits or, as it might be put, to determine the outcome of a hypothetical trial: *Stratford* supra. This will particularly be the case where a trial on the merits would involve complex factual matters where credit could be an issue.

(3) In determining the question of costs, it would be appropriate, however, for the court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them (*SEQEB*, supra).

(4) In a particular case it might be appropriate for the court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation: cf *Sunday Times Newspaper Co Ltd v McIntosh* (1933) 33 SR (NSW) 371.

(5) Where the proceedings terminate after interlocutory relief has been granted, the court may take into account the fact that that interlocutory relief has been granted: cf *Re Asiatic Electric Co Pty Ltd (in liq)* [1973] 1 NSWLR 603 at p 606, a case which, however, depended upon the specific wording of the statute under consideration.

[27] From these cases, it is for the court to determine whether taking into consideration the whole circumstances and situation, the discontinuance or withdrawal of the action by the plaintiff can safely be equated with defeat or an acknowledgement of likely defeat so as to justify that the plaintiffs be ordered to pay the defendant costs of the action.

[28] The court is entitled to take into consideration whether a plaintiff has acted reasonably in commencing the action and whether the action is ex facie certain to fail when it can be discerned without delving into the merits.

ANALYSIS OF THE SITUATION OF THE CASE

[29] Though the plaintiff action herein was commenced (on 21 October 2019) only about 11 days after the court made (on 9 October 2019) the declaration that the defendant's said appointment by the State Government of Sabah as the director of Sabah State Water Department contravened s 3 of the Sabah Water Supply Enactment 2003, the defendant continued to work and act as the director of Sabah State Water Department.

[30] Even though that court did not declare in Originating Summons No BKI-24–27/3 of 2019 that the appointment of the defendant as the director to be null and void but the court has declared the appointment to be clearly in contravention of s 3 of the Sabah Water Supply Enactment 2003. It must mean something directing at the legality of the appointment of the defendant at least. It is a difficult proposition to swallow that an act declared to be contravening the law is still legal and lawful and means nothing.

[31] The fact is, the defendant continued to act as the director of Sabah State Water Department, signing letter of intent as such director shortlisting and selecting contractors to undertake project of Sabah State Water Department in the face of the court declaration. It is reasonable for any law-abiding citizens at least to feel disturbed.

[32] In the circumstances, I do not find it unreasonable for the plaintiffs as the procurer of the court declaration in the previous action to commence the action herein on 21 October 2019.

[33] In respect of the submission of the defendant that the defendant had to continue conduct himself as the director of Sabah State Water Department as directed by the higher authority as the previous court declaration has not declared the defendant's appointment null and void and the defendant's stand as advised by his solicitor as to the effect of the contravention of s 3 of the Sabah Water Supply Enactment 2003, it is not necessary for me and I express no view thereto.

[34] No amount of words in the elaborated and abled submission of the counsel for the defendant can change the fact that it was after the plaintiff commenced the action herein on 21 October 2019, the Sabah State Public Service Commission issued a letter dated 30 October 2019 (exh AS1 of encl 12) to the defendant and appointed him as a technical adviser based in the State Secretary's Office with retrospective effect to 11 October 2019.

[35] By a further letter dated 1 November 2019 (exh AS2 of encl 12) of the Sabah State Public Service Commission, the defendant was immediately transferred to Sabah State Water Department to carry on duties as the director.

[36] It is difficult not to believe that such moves were not in response to counter the plaintiffs' action herein as commenced. It ought to be made very clear that I am expressing no view at all in respect of this new appointment of the defendant.

[37] The result is that thenceforth, the defendant is acting under a new appointment.

[38] The new appointment of the defendant removes or changes the subject of the disputes in the action which is based on the previous appointment of defendant declared earlier by the court to be in contravention of s 3 of the Sabah Water Supply Enactment 2003.

[39] There is no longer any issue of the defendant's continuing to carry out the duties and exercise the powers of the director of Sabah State Water Department under the earlier appointment which the court declared to be in contravening s 3 of the Sabah Water Supply Enactment 2003 and which the plaintiff sought to restrain in this action.

[40] Any issues of the impropriety of the defendant continuing to act and exercise the power as the director under the previous appointment become non issues. The basis of the plaintiffs' actions herein to restrain the defendant from continuing to act and exercise power as the director under the previous appointment and any cause of action in remedial thereto has been removed by the new appointment.

[41] In respect of the submission of counsel for the defendant that the plaintiffs should immediately withdraw the action after being made aware of the new appointment of the defendant when the plaintiffs were served with the defendant's affidavit in opposition (encl 12) revealing the new appointment of the defendant instead of further filing the affidavit in reply (encl 13) which necessitated the defendant to file further affidavit in reply (encl 17) and only decided to withdraw the action herein after the defendant's solicitors' notice of preliminary objection dated 8 January 2020 (encl 18), I do not find the plaintiffs to have conducted unreasonably in the circumstances.

[42] It does not appear to be unreasonable for the plaintiffs to further file their affidavit in reply (encl 13) to state their stand on the new appointment in relation to their action herein. The hearing of this action was then scheduled for 21 January 2020.

[43] The plaintiffs were entitled to reasonable time to appraise their position in making their decision in view of the change of circumstances due to the new appointment of the defendant as revealed by the defendant's affidavit in opposition (encl 12).

[44] In the circumstances, it does not appear to me that there was undue or unreasonable delay on the part of the plaintiffs to convey to the defendant's solicitors, the plaintiffs' decision to withdraw or discontinue the action herein, which was before the said scheduled hearing date.

[45] Obviously, the defendant has no wish also for the action to proceed to full hearing or trial and thus, required the plaintiffs to withdraw and discontinue the action.

[46] The defendant's counsel contended that the plaintiffs should be ordered to pay the defendant, costs of this action as the plaintiffs' action herein is bound to fail on the following grounds:

(a) the court in the previous action in Originating Summons No BKI-24–27/3 of 2019 did not declare that the defendant's appointment is null and void;

(b) the injunction sought for by the plaintiffs in the action contravenes s 29(2) of the Government Proceedings Act 1956;

(c) the new appointment of the defendant has rendered the plaintiffs' action academic;

(d) the plaintiffs' action is barred by the doctrine of res judicata;

(e) the plaintiff's action is an abuse of the process; and

(f) the penalty for breaching s 3 of the Sabah Water Supply Enactment 2003 is as provided in s 66 therein and not by way of vacating the seat/office of the director of the Sabah State Water Department.

[47] It is not appropriate for me to delve into the merits of the case of the respective parties as if conducting a full hearing of the action.

[48] However, if the defendant could establish that the plaintiffs' action is so plainly and obviously unsustainable and is certain to fail without the need for the court to delve into the merits of the case of the respective parties like trying the action and the defendant could also establish that by whole circumstances, the plaintiffs' withdrawal or discontinuance of this action really amounts to concession of defeat or an acknowledgement of likely defeat, it would be justifiable in the exercise of the discretion to order the plaintiffs to pay costs of the action.

[49] Suffice is to say that, the defendant's counsel has failed in his submission to persuade me that the plaintiffs' action is so plainly and obviously unsustainable and is certain to fail.

[50] I am not persuaded that it is so plain and obvious that the mere declaration by the court that the defendant's appointment is in contravention of s 3 of the Sabah Water Supply Enactment 2003 and short of declaring it null and void would have no legal effect at all so that the plaintiffs could not resort to the action to restrain the defendant in continuing acting as, carrying on the

duties and exercising the powers of the director of the Sabah State Water Department.

[51] In respect of s 29(2) of the Government Proceedings Act 1956, it is not that plain and obvious that when the defendant's appointment declared by the court to be in contravention of s 3 of the Sabah Water Supply Enactment 2003, the defendant could still claim 'as an officer' of the state government thereunder and against him, injunction could not be granted. See *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325; [2005] 2 CLJ 122 (CA).

[52] In respect of the contention of counsel for the defendant that the new appointment of the defendant has rendered the plaintiffs' action herein academic and bound to fail, the new appointment of the defendant is a change of event brought about after the commencement of the action. The change of event was not brought by the plaintiffs. It is the very reason and cause which the plaintiffs have to withdraw or discontinue the action. I find it absurd that it could be used to contend that the plaintiffs' action based on the previous appointment of the defendant is plainly and obviously unsustainable.

[53] I am not persuaded by the submission by counsel for the defendant that it is plain and obvious that the plaintiff's action herein to restrain the defendant to continue acting as, carrying on the duties and exercising the powers of the director Sabah State Water Department based on his previous appointment declared by the court to be in contravention of law is barred by the doctrine of res judicata and is an abuse of the process of the court. See *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC) and *Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v Ann Joo Steel Sdn Bhd and another appeal* [2017] 6 MLJ 397 (CA).

[54] In the premise, having regards to the whole circumstances and situation particularly the change of event by the new appointment of the defendant brought about after the plaintiffs commenced the action herein which renders the action academic, the decision by the plaintiffs to withdraw or discontinue the action cannot safely be equated with defeat or an acknowledgement of likely defeat of the plaintiffs' action.

[55] Further, plaintiffs appears to have commenced the action herein for public interest that the law is adhered to.

CONCLUSION AND PRONOUNCEMENT

[56] In the circumstances, it is unfair and unjust to penalise the plaintiffs to pay costs of the action.

A **[57]** I therefore grant the plaintiffs leave to withdraw or discontinue this action and order that each party shall bear their own costs.

Leave granted to withdraw action and respective party shall bear their own costs.

B Reported by Izzat Fauzan

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